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THE THE: THE DEFINIT(IV)E ARTICLE ON IDEA

Mark C. Weber*

Close observers of social justice litigation regarding the Individuals with Disabilities Education Act (“IDEA”)¹ have long noticed a split in authorities on whether to use the definite article “the” in front of that statute when it is referred to in its acronymic form. Is it “IDEA” or “the IDEA”?

In the 2000s, the members of the Supreme Court took up opposing sides. *Schaffer v. Weast* featured a majority opinion by Justice O’Connor in which IDEA appeared without an article.² Justice Ginsburg’s dissent put it in,³ but not maybe notoriously enough, for the subtle change generated no response from the majority. Then in *Winkelman v. Parma City School District*, Justice Kennedy, writing for the majority, eschewed the the.⁴ But Justice Scalia, concurring in the judgment in part and dissenting in part, embraced the the with both arms.⁵

One might think that since Justice Kennedy served as the swing member of the Court in that era, the other justices would all fall in line, but no. Justice Alito put the the front and center before the acronym in *Arlington Central School District Board of Education v. Murphy*,⁶ perhaps unconsciously mimicking the wordiness of “School District” and “Board of Education” in the case’s title. Justice Ginsburg switched sides on the issue in her partial concurrence in the case, casting off the the.⁷ Justice Breyer’s dissent, however, concurred with the majority at least on the use of the the.⁸ Justice Stevens’s majority opinion in *Forest Grove School District v. T.A.* skipped

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¹ 20 U.S.C. §§ 1400-1482 (2012 & Supp. IV 2016).

² 546 U.S. 49 (2005).

³ *Id.* at 64 (opinion of Ginsburg, J.).

⁴ 550 U.S. 516 (2007).

⁵ *Id.* at 536 (opinion of Scalia, J.).

⁶ 548 U.S. 291.

⁷ *Id.* at 305 (opinion of Ginsburg, J.).

⁸ *Id.* at 309 (opinion of Breyer, J.).

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the the,⁹ but Justice Souter's dissent apparently dissented on the omission of articles as well as methods of statutory interpretation and inserted it.¹⁰

So the justices disagreed. But which side had the better position? Those who remember something from their first year of law school will turn to common law methods and struggle for an appropriate analogy, but they will find that some statutory acronyms get the the, while others do not. Workers assert collective bargaining rights under the NLRA,¹¹ but demand their pensions under ERISA.¹² Students obtain remedial services under the ESEA,¹³ but sue for violations of privacy under FERPA.¹⁴

From careful study, a rule emerges: Acronyms that can comfortably be pronounced as a word do not use the article. Ones that are so much of a mouthful that they retain their quality as initials receive the the. This approach gives the speaker, reader or writer a chance to rest before getting covered with alphabet soup, while allowing a race to the top for those hooked on phonics. Following the rule, one would expect that IDEA, which not only is easily pronounced as a word, but actually is a word, would stand alone, shrugging off any need for a the.

But proving that the life of the law has not been logic but something else altogether, last year the unanimous opinion in *Endrew F. v. Douglas County School District RE-1*,¹⁵ as well as both majority¹⁶ and partial concurrence¹⁷ in *Fry v. Napoleon Community Schools*, employed the definite article, unnecessary and awkward as that might be. Thus the Supreme Court has laid down the law: It's *the* IDEA. True, the use of the article does not appear essential to the holding in either case,

⁹ 557 U.S. 230 (2009). This represents a switch in the position of the justice, who employed the article in his majority opinion in *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999). In that case, Justice Thomas dropped the the. *Id.* at 79 (Thomas, J., dissenting). As for other pre-2000s caselaw, *Agostini v. Felton*, though it did not directly involve IDEA, referred to the statute and used the the. 521 U.S. 203, 223 (1997) (majority opinion by O'Connor, J.). *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), though it did involve IDEA, managed to avoid the acronym altogether. The first Supreme Court case on IDEA after the statute ceased being the Education for All Handicapped Children Act is *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). Both majority (Rehnquist, C.J.) and the Blackmun dissent used the the. *Id.* at 15 (opinion of Blackmun, J.).

¹⁰ *T.A.*, 557 U.S. at 249 (opinion of Souter, J.).

¹¹ National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012).

¹² Employee Retirement Income Security Act, 29 U.S.C.A. §§ 1001-1461 (West 2018).

¹³ Elementary and Secondary Education Act, 20 U.S.C.A. §§ 6301-7981 (West 2018).

¹⁴ Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2012 & Supp. IV 2016). They lose, but that's another story. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (finding no enforceable right under privacy provisions of FERPA).

¹⁵ 137 S. Ct. 988 (2017) (Roberts, C.J.).

¹⁶ 137 S. Ct. 743 (2017) (Kagan, J.).

¹⁷ *Id.* at 759 (opinion of Alito, J.). Regarding the two cases, see *Endrew F. and Fry Symposium*, 46 J.L. & EDUC. 425 (2017).

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but as lawyers well know, dicta from the Supreme Court must be given respect, at least until the Court changes its mind.¹⁸ So when referring to IDEA from now on, be sure to add the three letters' worth of ink, or pixels or whatever. Don't forget the the.

¹⁸ See, e.g., *In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000) (“[W]e should not idly ignore considered statements the Supreme Court makes in dicta.”). *But see* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1274 (2006) (“The Supreme Court’s dicta are not law. The issues so addressed remain unadjudicated. When an inferior court has such an issue before it, it may not treat the Supreme Court’s dictum as dispositive. It must adjudicate.”).